

Message Text

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DOD:OGC (IA):MR. ALMOND (DRAFT)

NAVY:JAG:MAJ. GEHRING

OSD/ISA/EA&PR:CAPT. SHAID (DRAFT)

EA/RA:RFINCH (SUBSTANCE)

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TO AMEMBASSY MANILA PRIORITY

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SECAIRFORCE (SAFIA/SAFGC) WASHDC

CASF (JACI) WASHDC

CINCPAC HONOLULU HI

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CINCPACAF HONOLULU HI

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TAGS: MARR, US, RP

SUBJECT: MBA ARTICLE XIII - INTER SE OFFENSES

REF: MANILA 5847

CINCPAC ALSO FOR POLAD

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1. APPRECIATE EMBASSY'S HELPFUL EXPOSITION REFTTEL OF THE

INTER SE OFFENSES PROBLEM. TEXT OF PROPOSED NOTE AND EXPLANATION IN REFTEL, HOWEVER, GIVES US CONCERN THAT EMBASSY AND WASHINGTON DO NOT SHARE SAME ASSUMPTIONS AS TO STATUS OF PARA 1 (B) OF ARTICLE XIII. SPECIFICALLY, USG HAS NOT REPEAT NOT AS YET AGREED TO PHILIPPINE JURISDICTION OVER INTER SE CRIMES WHERE VICTIM IS A DEPENDENT AND A PHILIPPINE CITIZEN. THUS, WE ARE PUZZLED BY PARA 9 REFTEL AND BY THIRD PARA OF NOTE PROPOSED BY EMBASSY, WHICH ASSUME THAT THERE IS A LIST OF CRIMES, OF WHICH ONE IS RAPE, FOR WHICH USG HAS AGREED TO YIELD NORMAL INTER SE JURISDICTION WHEN PHILIPPINE CITIZEN DEPENDENT IS VICTIM. STATUS OF PARA,1 (B) IS AS DESCRIBED IN PARA 5, MANILA 1926, MARCH 2, 1972. WE UNDERSTAND THAT TO BE:

A. PARA 1 (B) IS NOT YET AGREED.

B. U.S. PREFERENCE IS FOR RETENTION OF EXISTING LANGUAGE FROM 1965 AGREEMENT.

C. GOP PROPOSAL IS TO ADD WORDS "UNLESS THE MEMBER OF THE CIVILIAN COMPONENT OR THE DEPENDENT IS A CITIZEN OF THE PHILIPPINES."

2. WE ALSO SEE INCONSISTENCY BETWEEN PROPOSED NOTE AND ARTICLE XIII, IN SENSE THAT U.S. JURISDICTION UNDER ARTICLE XIII EXTENDS ONLY TO MEMBERS OF U.S. ARMED FORCES, WHILE NOTE ASSUMES U.S. ALSO HAS JURISDICTION OVER CRIMES COMMITTED BY MEMBERS OF CIVILIAN COMPONENT AND DEPENDENTS.

3. WE FULLY CONCUR THAT DEFINITION OF INTER SE OFFENSE CANNOT BE TIED TO NARROW CLASSIFICATION SYSTEM OF PHIL CRIMINAL CODE, WHICH WOULD LIMIT USG JURISDICTION NOT ONLY IN CASES WHERE PHIL CITIZEN IS VICTIM, BUT ALSO WHERE CRIME IS INTER SE IN USUAL SENSE AND VICTIM IS NOT A PHIL CITIZEN. THOUGH WE ARE RELUCTANT TO COMPLICATE NEGOTIATIONS WITH DISCUSSION OF INTER SE DEFINITION, IF PHILS RAISE THE POINT OR IF EMBASSY PERCEIVES THIS AS SIGNIFICANT PROBLEM, THEN IT SHOULD BE MADE CLEAR TO GOP THAT PHIL CRIMINAL CODE DEFINITION OF INTER SE CRIMES CANNOT APPLY. WE COULD NOT AGREE TO OVERALL NARROWING OF DEFINITION OF

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INTER SE CRIMES.

4. EMBASSY'S EXPOSITION OF INTER SE PROBLEM LEAVES US IN DOUBT AS TO WHETHER CONCEDED GOP JURISDICTION OVER OFFENSES INVOLVING DEATH, SERIOUS INJURY, ROBBERY OR RAPE OF PHIL CITIZEN DEPENDENT WOULD SOLVE PROBLEM RAISED BY PHIL INTERPRETATION OF INTER SE OFFENSES IN ACCORDANCE WITH CATEGORIES OF OFFENSES UNDER PHIL LAW. WE NOTE THAT UNDER

PHIL LAW ROBBERY IS A CRIME AGAINST PROPERTY, AND HOMICIDE AND PHYSICAL INJURY ARE CRIMES AGAINST PERSON. THE QUESTION THEREFORE ARISES AS TO WHY THE UNITED STATES SHOULD SURRENDER JURISDICTION OVER THE DEATH, INJURY OR ROBBERY OF A DEPENDENT WHEN EVEN UNDER PHIL LAW SUCH OFFENSES APPARENTLY WOULD BE CONSIDERED INTER SE. MOREOVER, IT IS OUR UNDERSTANDING THAT PHIL CONCERN OVER INTER SE OFFENSES STEMS IN LARGE PART FROM THE PRACTICE OF U.S. MILITARY AUTHORITIES CLAIMING THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER SUCH OFFENSES AS ADULTERY, BIGAMY, AND CONCUBINAGE. ISSUE IN SUCH CASES WOULD APPEAR TO BE WHETHER THE OFFENSES ARE "SOLELY" AGAINST THE DEPENDENT SINCE THERE MUST BE A THIRD PARTY INVOLVED, USUALLY A PHIL CITIZEN FEMALE WHO IS NOT A DEPENDENT. INTERPRETATION OF THE WORD "SOLELY" IS A PROBLEM THAT HAS ARISEN IN MANY COUNTRIES IRRESPECTIVE OF CHARACTERIZATIONS OF OFFENSES UNDER LOCAL LAW. UNDER ANY REASONABLE INTERPRETATION OF WORD, WE WOULD BE HARD PRESSED TO JUSTIFY POSITION THAT ADULTERY, BIGAMY OR CONCUBINAGE, WHERE THE THIRD PARTY IS A PHIL CITIZEN WHO IS NOT A DEPENDENT, IS AN OFFENSE "SOLELY" AGAINST THE DEPENDENT SPOUSE.

5. WE APPRECIATE FACT THAT COLLUSION IS OFTEN INVOLVED IN SEXUAL OFFENSES SUCH AS ADULTERY, BIGAMY AND CONCUBINAGE. IT IS OUR IMPRESSION, HOWEVER, THAT CRIMINAL JURISDICTION IMPLEMENTATION COMMITTEE HAS BEEN ABLE IN PAST FEW YEARS TO MINIMIZE PROBLEMS RAISED BY COLLUSIVE OR EXTORTIONARY CHARGES. ONE POSSIBLE SOLUTION TO INTER SE PROBLEM, THEREFORE, WOULD SEEM TO BE FORMALIZATION OF CJIC AD HOC RESOLUTION OF THESE PROBLEMS BY ADDING FOLLOWING AS SECOND SENTENCE TO PARA 1 (B), ARTICLE XIII:

"THE CRIMINAL JURISDICTION IMPLEMENTATION COMMITTEE, REFERRED TO IN PARAGRAPH 19 OF THIS ARTICLE, SHALL ESTABLISH PROCEDURES FOR THE RESOLUTION OF QUESTIONS REGARDING THE RIGHT TO EXERCISE JURISDICTION OVER OFFENSES AGAINST THE PERSON OR PROPERTY OF A DEPENDENT WHO IS A CITIZEN OF THE PHILIPPINES BUT NOT A CITIZEN OF THE UNITED STATES."

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LISH PROCEDURES FOR THE RESOLUTION OF QUESTIONS REGARDING THE RIGHT TO EXERCISE JURISDICTION OVER OFFENSES AGAINST THE PERSON OR PROPERTY OF A DEPENDENT WHO IS A CITIZEN OF THE PHILIPPINES BUT NOT A CITIZEN OF THE UNITED STATES."

UNDER THIS APPROACH TO PROBLEM, NO SEPARATE EXCHANGE OF NOTES WOULD BE REQUIRED.

6. EMBASSY WILL NOTE THAT AD REFERENDUM TEXT OF PARA 19, ARTICLE XIII REFERS TO "JOINT COMMITTEE ON THE ADMINISTRATION OF JUSTICE." IN VIEW OF SUCCESS OF CJIC, WE THOUGHT IT ADVISABLE TO PRESERVE SAME NAME FOR COMMITTEE. ACCORDINGLY, UNLESS EMBASSY PERCEIVES REASON TO CONTRARY, PARA 19 SHOULD BE CHANGED TO REFER TO CJIC.

7. IF EMBASSY PERCEIVES PROBLEMS ASSOCIATED WITH APPROACH SET FORTH IN PARA 5 ABOVE PLEASE ADVISE. OTHERWISE, U.S. TECHNICAL LEVEL PANEL SHOULD TABLE SECOND SENTENCE TO PARA 1 (B), ARTICLE XIII, QUOTED IN PARA 5 ABOVE, IN RESPONSE TO PHIL INITIATIVES ON INTER SE PROBLEM. U.S. PANEL SHOULD NOT VOLUNTEER PROVISION IN ABSENCE OF PHIL INITIATIVE. FYI IF USG IS TO MAKE ANY CONCESSIONS IN INTER SE AREA, IT WILL BE WITH RESPECT TO CRIMES IN WHICH PHIL CITIZEN DEPENDENTS ARE VICTIMS, AND IN RETURN FOR APPROPRIATE PHIL CONCESSIONS ON OTHER OUTSTANDING CRIMINAL JURISDICTION ISSUES. END FYI.

8. INSOFAR AS OFFICIAL DUTY IS CONCERNED, EXCHANGE OF NOTES REFERRED TO IN PARA 1 (C) OF ARTICLE XIII SHOULD BE SAME AS V.S. DRAFTS OF AGREED MINUTES TABLED IN 1971 (SEE STATE 74387, APRIL 30, 1971 AND STATE 76789, MAY 4, 1971). DRAFT NOTE INCORPORATING LANGUAGE OF-1971 DRAFT MINUTES REGARDING OFFICIAL DUTY CASES WILL BE TRANSMITTED BY SEPTTEL IN NEAR FUTURE.

9. WE NOTE THAT AGREED PORTIONS OF ARTICLE XIII USE TERM "CIVILIAN COMPONENT," WHICH IS ALSO TERMINOLOGY OF 1965 CRIMINAL JURISDICTION AMENDMENT. "CIVILIAN COMPONENT," HOWEVER, IS NEITHER DEFINED NOR USED ELSEWHERE (E.G., ARTICLES XI AND XII) IN THE DRAFT MBA REVISION. WE WOULD PREFER NOT TO RAISE THIS PROBLEM AT PRESENT STATE OF CONFIDENTIAL

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NEGOTIATIONS IF IT WOULD BECOME A SUBSTANTIVE ISSUE, BUT WE WOULD HOPE THAT FINAL TEXT OF MBA WOULD USE CONSISTENT TERMINOLOGY THROUGH ALL ARTICLES.

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